U.S. Department of Justice

United States Attorney
Eastern District of New York

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Brooklyn, New York 11201

October 13, 2016

By ECF
Honorable Roslynn R. Mauskopf
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Josifidis v. Schneiderman et al.
No. 16-CV-1944 (Mauskopf, J.) (Levy, M.J.)

Dear Judge Mauskopf:

Pursuant to Your Honor's individual practices, the individual Defendants Steven Soo Hoo and Barbara Yonofsky, current and former employees of the United States Drug Enforcement Administration ("DEA") (hereinafter, the "Federal Defendants") write to respectfully request a pre-motion conference in this action. As explained below, the Federal Defendants respectfully submit that the claims asserted against them by Plaintiff Harry Theodore Josifidis ("Plaintiff") must be dismissed pursuant to Rule 12 of the Federal Rules of Civil Procedure or, in the alternative, Rule 56 of the Federal Rules of Civil Procedure, for the multiple reasons set forth below.

On August 9, 2012, the state Medicaid Fraud Control Unit ("MFCU") of the New York Office of the Attorney General ("OAG") arrested Plaintiff and placed him into New York State custody. (*See* Complaint, Dkt. No. 1 ("Cmplt.") at ¶ 42). The Federal Defendants were on site when MFCU agents arrested Plaintiff, but the Federal Defendants were not responsible for the arrest and did not otherwise arrest or detain Plaintiff. (*See* Cmplt. ¶¶ 81-82). New York State then arraigned Plaintiff in Queens County Criminal Court and secured an indictment by a state grand jury against Plaintiff for two counts of the unauthorized practice of medicine in violation of New York Education Law § 6512(1). (Cmplt. ¶¶ 47, 51). On April 23, 2015, following a three-day state court trial, Plaintiff was found not guilty. (Cmplt. ¶ 53).

Plaintiff now challenges the arrest and prosecution by the state OAG. Plaintiff asserts claims arising under 42 U.S.C. § 1983, the Fourth and Fourteenth Amendments to the United States Constitution, the New York State Constitution, and state common law for alleged false arrest and imprisonment, malicious prosecution, malicious abuse of process, violation of equal protection, failure to intervene, negligence, and intentional and negligent infliction of emotional distress. (*See generally* Cmplt.). As to the Federal Defendants, Plaintiff simply alleges, without any actual underlying factual basis, that they were "directly and actively involved in the wrongful and unlawful arrest and detention of Plaintiff . . . ." (*See* Cmptl. ¶¶ 81-82).

Plaintiff's Complaint fails to state any plausible claim for relief against the Federal Defendants. Plaintiff's only allegation as to the Federal Defendants is that they were present during the arrest on August 9, 2012.[1] (*See* Cmplt. ¶¶ 42, 81-82). Such a claim is legally insufficient. First, as a threshold matter, Plaintiff cannot seek relief against the Federal Defendants through 42 U.S.C. § 1983 because the Federal Defendants acted pursuant to their authority under federal law, not state law. *See, e.g.*, *Dotson v. Griesa*, 398 F.3d 156, 162 (2d Cir. 2005). Second, to the extent Plaintiff's constitutional claims against the Federal Defendants arise under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), those claims are barred by the three-year statute of limitations; the statute of limitations on Plaintiff's claim arising from the Federal Defendants' presence on the date of the state MFCU's arrest on August 9, 2012 expired over one year ago on August 9, 2015. *See Tapia-Oritz v. Doe*, 171 F.3d 150, 151 (2d Cir. 1999). Indeed, Plaintiff has not, and cannot, allege any "discrete" constitutional violation by the Federal Defendants during or after his August 9, 2012 arrest. *See Barbaro v. U.S. ex rel. Fed. Bureau of Prisons FCI Otisville*, 521 F. Supp. 2d 276, 282 (S.D.N.Y. 2007).

Third, even assuming that Plaintiff's *Bivens* claims against the Federal Defendants were not time barred (which they are), Plaintiff's claims fail on the merits. Plaintiff has failed to identify any particular conduct by either Federal Defendant that would plausibly rise to the level of a constitutional concern, particularly, where, as here, the Federal Defendants did not effectuate any arrest, detention, or prosecution of Plaintiff. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (". . . a plaintiff must plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution." (emphasis supplied)). Further, to the extent Plaintiff asserts *Bivens* claims against the Federal Defendants in their official capacities (*see* Cmplt. ¶ 27), Plaintiff's claims must be dismissed pursuant to the doctrine of sovereign immunity. *See, e.g.*, *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994). Fourth, Plaintiff has not pled any facts showing that the Federal Defendants violated a clearly-established constitutional right and, as such, the Federal Defendants are entitled to qualified immunity. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011); *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

Finally, although Plaintiff's Complaint broadly asserts a variety of negligence claims against all "Defendants," there has been no waiver of the United States' sovereign immunity for any negligent or wrongful act or omissions of the Federal Defendants while acting within the scope of their employment. *See* 28 U.S.C. §§ 1346(b), 2671-2680. Plaintiff has not exhausted administrative remedies by filing a claim with the appropriate agency within two years of the alleged injury by the Federal Defendants. *See* 28 U.S.C. §§ 2401(b), 2675(a). As such, this Court lacks subject matter jurisdiction, and Plaintiff's purported negligence claims against the Federal Defendants must be dismissed. *See, e.g.*, *McNeil v. United States*, 508 U.S. 106, 109, 113 (1993); *Soriano v. United States*, 352 U.S. 270, 276 (1957).

[1] The Federal Defendants were present on the date of the arrest merely to ask Plaintiff if he would voluntarily surrender his controlled substances privileges, which he did. *See* 21 C.F.R. § 1301.52(a).

For the foregoing reasons, the Federal Defendants reserve the right to join in the state defendants' motion to dismiss and/or to assert additional federal-specific arguments in the Federal Defendants' own motion, and respectfully request that the Court schedule a pre-motion conference to address the Federal Defendants' anticipated motion or, in the alternative, set a briefing schedule for the parties' anticipated dispositive motions.

We appreciate the Court's consideration of this matter.

Respectfully submitted,

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